SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1693

WILBERT JACKSON,

Petitioner,

—v.—

NEW YORK CITY TRANSIT AUTHORITY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

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PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

Petitioner prays that a writ of certiorari issue to review the judgment of the New York State Court of Appeals entered in this case on February 13, 1974.

Citations to Opinions Below

The order of the New York State Court of Appeals, not yet reported, appears in the Appendix. The order of the Appellate Division, reported at 41 A.D.2d 646, 340 N.Y.S.2d 609, is also in the Appendix. Those orders are based upon an order in a precisely similar case, *Matter of Greenwald* v. *Frank,* 32 N.Y.2d 862 (1973), which is also set forth in the Appendix, together with the decision of intermediate appeal, 40 A.D.2d 717, 337 N.Y.S.2d 225, which considers the issues herein.

Jurisdiction

The order of the New York State Court of Appeals was entered on February 13, 1974. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3).

Questions Presented

May the state constitutionally dismiss a police lieutenant from a permanent civil service job solely because he wears a neat goatee?

Does the term "discipline" embody a legitimate state interest which, under the Fourteenth Amendment, may justify curtailment of the rights of policemen?

Is the curtailment of the rights of policemen justified under the Fourteenth Amendment upon the basis that the police are a "quasi-military" organization?

Statement of the Case

Until October 8, 1971, petitioner was a lieutenant in the police force of the respondent, New York City Transit Authority, with full civil service status (R-A6).* In January, 1970, petitioner briefly wore a goatee of the type shown in the photograph in the Appendix (App. p. 19a). He was relieved of duty and was charged with "misconduct" for refusing orders to shave the beard (R-A7).

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* The symbol "R-....." refers to the record in the New York State Court of Appeals.

The charges were based upon a passage in the Manual of Procedure for the transit police, which states, in Ch. 12, para. 27.0 (R-A130):

> A member of the force shall be responsible for the neatness and cleanliness of his person and uniform while on duty.

Pursuant to this regulation the transit police had promulgated a directive on May 15, 1969 (R-A32) forbidding "goatees, beards or other chin adornment."

After a hearing on March 27, 1970, the petitioner was reprimanded upon the following grounds (R-A7, 13-14):

> Respondent's appearance, with his beard, unquestionably is neat and not in violation of the Manual of Procedure. His duty, however, when directed to remove his beard, was to obey and grieve, as compliance did not offer any physical risk nor require the commission of a criminal or illegal act.

The petitioner then shaved his beard, and began a grievance on or about April 25, 1970, which was finally decided against him on or about December 9, 1970, by a decision of a hearing examiner, saying (R-A40):

> The police officer occupies a position of great sensitivity in the community and it is the duty of the Commanding Officer of a Police Department to issue such orders pertaining to mannerism, dress and conduct so as to provide an image of "oneness" to the public that will lead civilians to appreciate and accept the principle that a "Policeman is a policeman, is a policeman."

During the course of the grievance procedure, one of Lieutenant Jackson's superiors gave these reasons for the directive (R-A74):

> 1. The department has the responsibility to insure the neatness of its members (M & P, Chap. 12, para. 27.0) and that wearing beards of assorted shapes and sizes would detract from this appearance of neatness and cleanliness.
>
> 2. Military and semi-military organizations such as the Armed Forces of the United States and the New York City Police Department among many other police departments have similar regulations prohibiting the wearing of beards.
>
> 3. In a recent lawsuit brought in Nassau County, New York, it was held that such a regulation by a police department was proper and necessary and under no circumstances could be considered either arbitrary or capricious.
>
> 4. Lastly, that the wearing of beards, because of the Militant extremists, both on the left and right, among the citizenry would create many unnecessary police problems.

After this adverse ruling, petitioner again grew a goatee of the same type, was again charged with misconduct for refusing to cut it, and was again tried before the same hearing officer as before. Based upon a decision that petitioner was bound by the decision in the grievance procedure, petitioner was found guilty and dismissed from his post on October 8, 1971.

Petitioner then brought this proceeding in Supreme Court, Kings County, alleging that the dismissal violated his rights to privacy, to freedom of expression and to due process and equal protection of the laws, and that it was arbitrary and capricious (R-A9), all under the Fourteenth Amendment to the United States Constitution. Respondent sought to justify the ruling on the grounds set forth in the affidavit of the chief of the Transit Police (R-A132-133), "that said regulation is reasonable and necessary to create a uniform appearance among transit police officers and to insure that each officer has a professional appearance which is essential to engendering public confidence and respect."

The Appellate Division, Second Department, by a three-to-two vote, affirmed the decision of the Transit Authority on February 5, 1973. The dissenting justices relied upon the dissenting opinion in the *Matter of Greenwald* v. *Frank*, 40 A.D.2d 717, aff'd 32 N.Y.2d 862 (1973) (App. p. 6a), a case which was on all fours.

Because a constitutional question was involved the petitioner appealed as of right to the New York State Court of Appeals and that court affirmed the decision below, relying on its summary affirmance in the *Greenwald* case.

REASONS FOR GRANTING THE WRIT

I.

The Decision of the New York State Court of Appeals Conflicts Directly With a Ruling of the Second Circuit Court of Appeals.

The welter of litigation relating to the manner of wearing hair and beards has finally led to a breakdown in the rule of law with relation to public employees in New York State. The decision in the present case relies upon the earlier authority of *Matter of Greenwald* v. *Frank*, 32 N.Y. 2d 862 (App. p. 18a), which was on all fours in its facts, relating, as it did, to hair and beard regulations for policemen. That case was decided on May 30, 1973, and in the interval between that decision and the present one, the Second Circuit Court of Appeals decided *Dwen* v. *Barry*, 483 F.2d 1126 (August 22, 1973). *Greenwald* and *Dwen* were as alike as it is possible for two cases to be, the first relating to grooming regulations for police in Nassau County, and the second to similar regulations in Suffolk County, the immediately contiguous county in Long Island. Yet the decisions are diametrically opposed in principle and in effect. The Second Circuit said:

> We hold only that choice of personal appearance is an ingredient of an individual's personal liberty, and that any restriction on that right must be justified by a legitimate state interest reasonably related to the regulation. 483 F.2d at 1130.

The Appellate Division, in language affirmed without opinion by the State Court of Appeals, said (App. p. 6a):

> The rationale of the modest regulation in question, concerning personal appearance, setting forth rules as to haircuts, sideburns, mustaches and beards, is that there should be neatness and discipline in a large quasi-military organization such as the Nassau County Police Department so that the general public will have respect for the members of the Department. In our opinion this regulation does not raise issues which rise to the dignity of constitutional questions.

The present case was brought in the State courts before, but argued after, both *Dwen* and *Greenwald* had been decided. Petitioner vainly sought a reconsideration of *Greenwald,* to bring it into harmony with *Dwen;* the State Court of Appeals continued to follow *Greenwald.* The refusal of the New York State Court of Appeals to follow *Dwen* has created an untenable situation for uniformed employees in the state. They do not know whether or not regulations relating to beards can be enforced or not. If an employee desires to wear a beard, and seeks relief in the federal courts, he can get it. If the same employee, or one similarly situated, seeks relief in the state courts, he cannot get it. If the employer should seek declaratory relief against employees concerning such grooming regulations in the state courts, he has the power to preempt the field and coerce those employees by the rulings of the state courts, even though they are in conflict with federal precedents.

The issues in this case have recurred dozens of times, and will recur uncountable times in the future, both in the State of New York and elsewhere. See Point II. Not only is this a case in which a conflict between the state and the

federal courts of concurrent jurisdiction requires resolution, but it is also one of particular significance, making it appropriate for this Court at last come to grips with the issues.

II.

The Issues in This Case Are of Particular Significance.

This case comes before this Court not from the world of minor students attacking the grooming regulations of a public school, but from the entirely different arena of adult civil service employees. The petitioner, a black man and formerly a lieutenant in the New York City Transit Authority Police Department, has been deprived of his permanent civil service status because of his insistence on his right to wear a neat goatee. This case affects a different group from that in the student cases, and presents substantially different constitutional issues.

This Court has held that the state may not deprive a person of his employment by means which are unrelated in any rational way to the person's capacity to do the work, *Schware* v. *Board of Bar Examiners,* 353 U.S. 232 (1957). This rule is applied with particular strictness when the state's arbitrary requirements encroach upon a constitutional right of a public employee. As this Court is aware, the scope of the constitutional right to wear one's hair as one pleases is a question much litigated before the courts of the nation. It is not necessary to recite here the mass of decided cases upon the issue; the more than one hundred cases are ably summarized in Note, "On Privacy: Constitutional Protection for Personal Privacy," 48 N.Y.U. Law Rev. 670, 760-770 (1973). The right is rooted in the per-

ception that it is intolerable for the state to interfere in the private habits of public employees for arbitrary reasons. The right to wear one's hair as one pleases has been variously formulated, but has centered on a right of personal autonomy allied to the right of privacy, the right "to be let alone," e.g. *Griffin* v. *Tatum,* 300 F. Supp. 60, 62 (M.D. Ala. 1969), and to the First Amendment right of expression. *Richards* v. *Thurston,* 424 F.2d 1281, 1284 (1st Cir. 1970). See also Note, "On Privacy," *supra* at 761-763. As the Second Circuit Court of Appeals put it in the very case which conflicts directly with this one, *Dwen* v. *Barry,* 483 F.2d at 1130:

> While it has been argued that hair length controversies are much ado about nothing, we think there is a substantial constitutional issue raised by regulation of the plaintiff's hair length. The question is whether the government may interfere with the physical integrity of the individual and require compliance with its standard of personal appearance without demonstrating some legitimate state interest reasonably requiring such restriction on the individual. The first, third, fourth, seventh and eighth circuits have held that the Constitution limits the state's right to regulate the personal appearance of its citizens. We agree. *See* Olff v. East Side Union High School District, 404 U.S. 1042, 92 S.Ct. 703, 30 L.Ed.2d 736 (Douglas, J., dissenting from denial of certiorari).
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> We may well base the right on the guarantee under the Due Process Clause of personal liberty of "a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and

> purposeless restraints. . . ." Poe v. Ullman, 367 U.S. 497, 543, 81 S.Ct. 1752, 1777, 6 L.Ed.2d 989 (1961) (Harlan, J., dissenting). *Cf.* Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 726, 35 L.Ed.2d 147 (1973); Rochin v. California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952). Personal liberty is not composed simply and only of freedoms held to be fundamental but includes the freedom to make and act on less significant personal decisions without arbitrary government interference. Limitation of such a right requires some showing of public need. (footnotes omitted)

It is the proposed "legitimate state interest" advanced by the state in the present case, *Matter of Greenwald* v. *Frank, supra,* which has chiefly created the sharp division between courts of coordinate jurisdiction. In *Greenwald,* the state courts held that the "quasi-military" nature of police work justified the regulation; that the interest of discipline alone was enough. In the decision that was affirmed without opinion by the Court of Appeals, and was relied on in this case, such language was adopted by the majority, and was rejected by the dissent (App. pp. 13a-15a). The same sort of justification was used on the record by the administrative authorities in this case. The justification by "discipline" in a "quasi-military" group was used by the District Court in *Dwen* v. *Barry,* 336 F. Supp. 487 (E.D.N.Y. 1971). The Second Circuit specifically rejected that justification, as it appeared both in the District Court below in that case and in the state court in *Greenwald,* 483 F.2d at 1128-1129:

> The civilian police force is a relatively recent development. It arose out of the need to supplement the

private citizen's role in keeping the peace. Any "paramilitarism" of the force stems not from its origin nor from the nature of its duty but from the adoption of an organization with a centralized administration and a disciplined rank and file for efficient conduct of its affairs. The use of such organization evolved as a practical administrative solution and not out of any desire to create a military force. *See* R. Fosdick, American Police Systems ch. 2 (1920); W. Lee, A History of Police in England (1901) (1971 ed.). The police force remains significantly different in character from the military. It is still locally controlled and organized, see N.Y. Unconsol. Laws § 5721, and subject to more direct control of the electorate, N.Y. Unconsol. Laws § 5722, Suffolk County Constitution art. XII § 1202(a), (b)(4), (b)(5) and § 1211. Appointment of members of the force is made under Civil Service Regulation. While police officials are given broad discretion in running a department, dismissal of patrolmen is subject to court review. N.Y. Village Law § 8-806 (McKinney N.Y. Unconsol. Laws § 5732); *see* People ex rel. Hart v. Board of Fire Commissioners, 82 N.Y. 358, 360-61 (1880).

Discipline although essential to an effective police force as it is to the military is clearly of a different type. Instant unquestioning obedience has been found essential to a soldier in action and his training and its attendant discipline is designed to develop such obedience. The same type of instant unquestioning obedience is not necessary for an effective police force. *See* Greenwald v. Frank, *supra,* 40 A.D.2d 717, 337 N.Y.S. 2d at 231-232 (Shapiro, J. dissenting); cf. Orloff v.

> Willoughby, *supra,* 394 U.S. at 94, 73 S.Ct. 534, 97 L.Ed.2d 842. Rather it has been suggested that the military model of organization and discipline must not be followed too closely as a policeman unlike a soldier frequently acts individually on his own initiative and not subject to the immediate supervision of his superiors. *See* W. Lee, A History of Police in England at 401-402. 483 F.2d at 1128-1129. (footnotes omitted)

The Circuit Court thus took issue with the state courts on a basic issue of policy, holding that, where the state chooses to designate the police forces within its borders as "quasi-military" that phrase is not sufficient by itself to establish a desirable policy which may be relied upon to limit federal rights.

The policy embodied in the decision of the court below and specifically rejected by the Second Circuit, justifying the regulation forbidding beards by the alleged "disciplinary" needs of something designated a "quasi-military" organization, presents important policy questions for resolution by this Court. It is a critical question whether the state may appeal simply to the need for "discipline" as a state interest to justify infringement upon the private lives of public employees. Discipline appears to embody a circular idea, by which, in the words of one of the hearing officers in this case, officials try to prove that "a policeman is a policeman, is a policeman" (R-A40).

It is a perhaps more critical question whether the assimilation of the police to the military is a desirable or permissible "state interest" to justify infringement upon the private lives of policemen in a democratic society. As the Second Circuit Court of Appeals pointed out in *Dwen* v.

Barry, supra, that assimilation is a development which has historically been rejected in this country. This Court should consider whether such a policy may be characterized as a legitimate state interest at all, and in particular, whether it can support a regulation which has no stronger justification than those advanced by the New York City Transit Authority in this case. See discussion of the military analogy in a First Amendment context, Moody, "Extending the Shield of the First Amendment to the Outspoken Policeman," 8 Crim. L. Bull. 171, 184-190 (1972).

CONCLUSION

For the reasons set forth above, the petition for certiorari should be granted.

Respectfully submitted,

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